

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL JOHN BRANCACCIO,

Defendant-Appellant.

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UNPUBLISHED

January 25, 2007

No. 263321

Ottawa Circuit Court

LC No. 04-028442-FC

Before: Sawyer, P.J., and Neff and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony-murder, MCL 750.316(1)(b), larceny in a building, MCL 750.360, and unlawfully driving away an automobile (UDAA), MCL 750.413. He was sentenced as a fourth-felony habitual offender, MCL 769.12, to a single term of life imprisonment for the murder convictions and sixty to eighty months' imprisonment for the UDAA conviction.<sup>1</sup> He appeals as of right, and we affirm.

Defendant first argues that defense counsel was ineffective for failing to have him evaluated by a medical professional for the purpose of pursuing an insanity defense based on involuntary intoxication. We disagree.

The right to counsel guaranteed by the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, also encompasses the right to the effective assistance of counsel. *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, a defendant must show that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the result of the proceedings would have been different. *People v Mack*, 265 Mich App 122,

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<sup>1</sup> The trial court vacated the larceny conviction because it was the underlying felony for the felony-murder conviction, and the premeditated murder and felony-murder convictions were merged into a single conviction.

129; 695 NW2d 342 (2005). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

There was no evidence that defendant was under the influence of any substance at the time the crimes were committed. Additionally, defendant has not offered any evidence suggesting that the mere fact that he had a long history of drug abuse somehow affected his mental faculties at the time of the offenses. Because there is no basis in the record for concluding that an insanity defense may have been viable,

defense counsel was not ineffective for failing to pursue such a defense. *Mack, supra* at 130 (counsel is not ineffective for failing to advocate a meritless position).

Defendant next argues that defense counsel was ineffective for failing to challenge the validity of his extradition waiver. “Challenges to extradition proceedings must be made in the asylum state. Opposition to such extradition comes too late upon submission to the jurisdiction of the charging state.” *People v Duck*, 147 Mich App 534, 540-541; 383 NW2d 245 (1985). Defendant recognizes this rule of law, but asserts that this Court should nevertheless review the issue because the Illinois authorities failed to secure an attorney for defendant, despite his request for one. We reject defendant’s argument for two reasons. First, defendant cites no exception to the governing rule of law. Second, the record discloses that defendant revoked his request for an attorney before the extradition waiver was signed.

Defendant next argues that the trial court erred in denying his motion to suppress his custodial statements because the statements were not voluntarily made. The basis for defendant’s motion to suppress below was that some of the statements were obtained after he invoked his right to an attorney, not that the statements were not voluntarily made. Therefore, this issue is unpreserved. See *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). This Court reviews unpreserved issues for plain error affecting a defendant’s substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

In order to effectively waive *Miranda*<sup>2</sup> rights, a defendant must make the waiver knowingly, intelligently and voluntarily. *People v Daoud*, 462 Mich 621, 633; 614 NW2d 152 (2000). Defendant argues that his *Miranda* waiver and statements were not voluntary. Defendant relies on the “inherently coercive atmosphere of the interrogation session” and the “coercive atmosphere purposefully created by the police.” A voluntary waiver requires the absence of police coercion. *Id.* at 635. However, defendant points to no specific actions by the police that were coercive. The alleged “inherent” coercive atmosphere is insufficient to find that defendant’s waiver was not voluntary.

Second, defendant asserts that he was still under the effects of heroin at the time he waived his rights. The evidence showed that defendant ingested heroin approximately sixteen hours before he signed his first waiver. One of the interviewing police officers testified that

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<sup>2</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

defendant did not appear to be under the influence of any controlled substance at that time and that he had slept the night before. Defendant was an admitted habitual user of heroin and there was testimony at trial that the effects on such a person would last four to eight hours. Defendant argues that evidence of his emotional outburst in his jail cell shows that he was still under the influence of the drug. However, this incident occurred at least thirty hours after defendant last ingested the heroin. The record does not support defendant's contention that this isolated, two-minute incident was sufficiently related to defendant's heroin usage. Accordingly, we find no plain error. The trial court properly denied defendant's motion to suppress.

Defendant next argues that the trial court improperly admitted evidence of his drug addiction and participation in a credit card fraud scheme. This Court reviews a trial court's evidentiary rulings regarding the admissibility of bad acts evidence for an abuse of discretion. *People v McGhee*, 268 Mich App 600, 609; 709 NW2d 595 (2005). The abuse of discretion standard is deferential and acknowledges that there is no single correct outcome; rather, there are multiple reasoned and principled outcomes. When a trial court chooses one of these principled outcomes, it does not abuse its discretion. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Defendant did not object below to the credit card evidence. Therefore, this portion of the issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *Carines*, *supra* at 763.

The trial court admitted the evidence under MRE 404(b) to show motive. To be admissible under MRE 404(b), bad acts evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Defendant does not argue that the evidence was offered for an improper purpose or was irrelevant. Rather, defendant argues that the trial court abused its discretion because the probative value of the evidence outweighed its prejudicial effect. We disagree.

With regard to evidence of a defendant's drug addiction, this Court has stated that in order to minimize undue prejudice by the evidence, such motive evidence should be admitted with utmost discretion and only where the proofs established

“(1) that defendant not merely used a drug, but that he used a drug which is addictive and that he actually was, in some substantial measure, addicted, and thus, compelled to obtain the drug; (2) that he used the drug in such quantity that maintenance of his habit was expensive; (3) that he lacked sufficient income from legal sources to sustain his habit.” [*People v McConnell*, 124 Mich App 672, 682; 335 NW2d 226 (1983), quoting *People v Walker*, 86 Mich App 155, 159 n 2; 272 NW2d 222 (1978).]

The testimony here established that defendant was a long-time heroin user, that he used it two to three times a week, and that he had no job. His only source of income was his wife's job at a restaurant. Moreover, defendant's use of the victim's credit cards to attempt to obtain money was discussed in his custodial statements. We agree with the trial court that the evidence of the credit card scheme was necessary to understand the circumstances of the case and defendant's statements. Under the circumstances, the probative value of the evidence was not substantially outweighed by any prejudicial effect.

Defendant further argues that the trial court erred by failing to give a cautionary instruction regarding the limited purpose of the other acts evidence. Because defense counsel did not request a cautionary instruction and expressed satisfaction with the instructions that were given, he waived review of this issue. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). In the alternative, defendant asserts that this Court could consider this issue as a claim of ineffective assistance of counsel. However, we are satisfied that the failure to give such an instruction did not affect the outcome of the trial.

Defendant also argues that the trial court improperly admitted DNA evidence without a proper foundation. Defense counsel expressly stated that he had no objection to the trial court taking judicial notice of the reliability of the DNA testing. Therefore, defendant waived review of this issue. *Carter, supra* at 215-216. However, defendant also presents this issue in the context of an ineffective assistance of counsel argument, which we also reject. The polymerase chain reaction (PCR) testing method and its statistical analysis that were utilized in this case have been widely accepted by Michigan courts as reliable. *People v Coy*, 258 Mich App 1, 9-12; 669 NW2d 831 (2003). There is no evidence suggesting that the lab's equipment was not working properly or that proper procedures were not followed. Thus, there is no basis for concluding that defense counsel was ineffective in not raising a foundational challenge to the DNA evidence.

In a Standard 4 brief, defendant asserts that there was insufficient evidence to support his first-degree murder and felony-murder convictions. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

Defendant argues that his first-degree murder conviction cannot be sustained because there was no evidence of premeditation. To prove first-degree murder, the prosecutor must prove that the killing was intentional and that the act of killing was accompanied by premeditation and deliberation on the part of the defendant. *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2002). Premeditation occurs where there was sufficient time between the homicidal intent and the action to afford a reasonable person time to take a second look. *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003).

The evidence showed that the victim was strangled both manually and by a ligature. Both methods would have taken between three and four minutes to cause death. Additionally, the evidence showed that the ligature was repositioned at least once. It was reasonable for the jury to find that this was a sufficient length of time to afford defendant a chance to reconsider his actions. By convicting defendant of first-degree murder and not voluntary manslaughter, it rejected defendant's contention that he was so enraged that he did not have sufficient time to cool down before his actions resulted in the victim's death. This Court will not interfere with the jury's credibility determinations or the weight it affords evidence. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). Viewed in a light most favorable to the prosecution, the evidence was sufficient evidence to support defendant's conviction of first-degree premeditated murder.

Defendant also argues that his felony-murder conviction cannot be sustained because there was no evidence that the victim was killed in furtherance of an intent to commit a larceny.

Again, we disagree. A murder committed during the perpetration or attempted perpetration of any kind of larceny is felony-murder. MCL 750.316(1)(b). To be felony-murder, a murder need not be contemporaneous with the underlying felony; the defendant need only have intended the underlying felony at the time the homicide occurred. Felony-murder cannot occur if intent to commit the underlying felony was not formed until after the homicide. *People v Brannon*, 194 Mich App 121, 125; 486 NW2d 83 (1992).

In defendant's third confession, he stated that he and an accomplice intended to rob the victim's house before the accomplice entered it. In defendant's second confession, he stated that he decided to rob the house after he strangled the victim. Defendant asserts that the jury was required to wholly accept only one version of his story. However, a jury is allowed to accept all, part, or none of the presented evidence. It was reasonable for the jury to believe that what actually occurred was a mixture of defendant's accounts. Also, defendant stated in his second confession that after the victim went limp, he robbed the house. While doing so, he heard a thump and checked on the victim because he thought the victim might have regained consciousness. Viewing the evidence in a light most favorable to the prosecution, the jury reasonably could have inferred that defendant killed the victim at this point. Thus, there was sufficient evidence to support defendant's felony-murder conviction.

Defendant also argues that defense counsel's comments about defendant in his closing argument deprived him of the effective assistance of counsel. We disagree. When defense counsel's closing argument is viewed as a whole, it is apparent that defense counsel was employing a strategy of arguing that defendant was only guilty of voluntary manslaughter, not first-degree murder. A lawyer does not render ineffective assistance by conceding certain points at trial, including conceding guilt of a lesser offense. Only a complete concession of guilt constitutes ineffective assistance of counsel. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). That a strategy does not work does not render its use ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Affirmed.

/s/ David H. Sawyer  
/s/ Janet T. Neff  
/s/ Helene N. White